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No. 97-232

In The

Supreme Court of the United States

October Term, 1996

EDDY POTASH, INC.,

Petitioner,

vs.

JEANNE HARRISON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF IN OPPOSITION

Respondent Jeanne Harrison submits the following Brief in Opposition to the Petition for a Writ of Certiorari of Petitioner Eddy Potash, Inc. ("EPI") pursuant to Sup.Ct.R. 15.

I. STATEMENT OF THE CASE.

Ms. Harrison does not concur in EPI's statement of relevant facts, and refers the Court to the statement of facts in the opinion of the Tenth Circuit for a more accurate and complete statement of the facts of this matter. *See Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1440-42 (10th Cir. 1997); Petition for a Writ of Certiorari ("Petition"), App. A at 3a-9a.

In addition, Ms. Harrison notes that EPI misstates the extent of supervisor Robert Brown's authority. Brown made recommendations on discipline, termination, and promotions, his opinions were solicited, his recommendations were considered and usually followed by higher level management, and he otherwise participated in these matters. 10th Cir. App. I, pp. 8-9 (testimony of Brown); 10th Cir. App. J, pp. 10, 13, 16, 21-22, 24, 35-36, 56, 59 (testimony of Jim Ryan, EPI's Vice-President of Operations and General Manager).

II. ANY REVIEW THAT MAY BE NECESSARY IS PREMATURE.

This is an interlocutory matter. The Tenth Circuit merely reversed the judgment of the District Court and remanded for further proceedings. 112 F.3d at 1454, Petition, App. A at 42a. Since this matter has not been

brought to a final judgment, review at this time would be premature. *Virginia Military Institute v. United States*, 508 U.S. 946, 113 S.Ct. 2431, 124 L.Ed.2d 651 (1993).

III. THE COURT SHOULD DENY CERTIORARI ON THE EMPLOYER LIABILITY ISSUE.

A. THE TENTH CIRCUIT CORRECTLY DETERMINED THE BASES FOR EMPLOYER LIABILITY.

The first issue in this case concerns the bases, under Title VII, for holding an employer liable for sexual harassment committed by a supervisor. In this case, Jeanne Harrison's supervisor, Robert Brown, was only able to accomplish his sexual assaults because, as Ms. Harrison's supervisor, he could order other people to take Ms. Harrison's usual job, require Ms. Harrison to go with him on the pretext of doing certain tasks, and take her to isolated locations in the mine where the assaults could occur without fear of discovery. Jeanne Harrison therefore sought to hold EPI liable under the second clause of Restatement (Second) of Agency § 219(2)(d) (1958). Section 219(2)(d) provides:

> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> * * *
>
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, *or he was aided in accomplishing the tort by the existence of the agency relation.*

(emphasis added). The district court refused Ms. Harrison's instructions based on this section, but the Tenth Circuit reversed, holding that an employer would be liable for the harassment of its supervisor

> [i]f the employer delegated the authority to the supervisor to control the plaintiff's work environment and the supervisor abused that delegated authority by using that authority to aid or facilitate his perpetration of the harassment. See Restatement (Second) of Agency § 219(2)(d), clause 2.

112 F.3d at 1446, Petition, App. A at 20a.

In applying Restatement (Second) of Agency § 219(2)(d), the Tenth Circuit followed this Court's decision in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). In that case, the Court directed lower courts to look to the law of agency in determining the liability of employers, and specifically cited Restatement (Second) of Agency §§ 219-237 (1958). 477 U.S. at 72, 106 S.Ct. at 2408.

The Tenth Circuit correctly interpreted § 219(2)(d). The plain language of this section provides for two distinct bases of employer liability. Liability exists if there was reliance on apparent authority "or" if the supervisor was aided by the agency relationship. EPI's interpretation, requiring apparent authority for the second clause as well as the first, renders the second clause superfluous. If apparent authority is required for both clauses, they both mean the same thing.

It is only fair that the employer be held liable when the supervisor is aided by the agency relationship, since

the employer has enabled the harassment to occur by investing the supervisor with powers necessary to commit the harassment.

B. THE DECISION BELOW DOES NOT CONTRADICT *MERITOR SAVINGS BANK, F.S.B. V. VINSON*

1. The Tenth Circuit did not create "strict liability."

EPI contends that the Tenth Circuit's opinion in this case is contrary to the Court's opinion in *Meritor,* because it adopted a standard of "strict liability." *Meritor* instructs that employers are not "always automatically liable," because Congress wanted liability to be limited by the principles of agency law. *Meritor, supra,* 477 U.S. at 72, 106 S.Ct. at 2408. The standards that place limits on employer liability and that prevent liability from being automatic are therefore the standards of agency law.

By applying Restatement (Second) of Agency § 219(2)(d), the Tenth Circuit followed *Meritor,* and placed limitations from agency law on the liability of employers, such that they are not automatically liable. Under this section, as applied by the Tenth Circuit, employers are only liable if supervisors use their delegated authority over the employees' work environments to aid them in accomplishing the harassment. The Tenth Circuit did not create automatic liability, but held that liability could only be imposed if this criterion from agency law is met.

Nonetheless, EPI claims that the Tenth Circuit's ruling is tantamount to "strict liability" because, "[b]y its

very nature, the employment relationship brings the supervisor and the employee together at the place of employment and assists the supervisor in the accomplishment of the harassment." Petition at 10; *see also,* Petition at 13-14. However, as EPI acknowledges, the Tenth Circuit specifically provided that liability does not attach "where the harasser's agency relationship merely provided him with proximity to plaintiff." 112 F.3d at 1446, Petition, App. A at 19a.

If the rule adopted by the Tenth Circuit resulted in liability in every case, liability under Restatement § 219(2)(d) would have been argued in many cases. Instead, as the cases cited by EPI demonstrate, cases such as the present one, in which the facts clearly support a claim under § 219(2)(d), occur only infrequently.

2. The decision below followed *Meritor* in holding that a policy against discrimination and a grievance procedure are relevant evidence.

The Tenth Circuit discussed the effect of the establishment and implementation of a policy against sexual harassment under both clauses of the Restatement (Second) of Agency § 219(2)(d). With respect to the first clause, the Tenth Circuit held that

> if an employer has taken steps "to remove any possible inference that a supervisor has authority to sexually harass his subordinates," 48 Vand.L.Rev. at 1087, the victim is likely aware the harassment is not authorized, and reliance on apparent authority will be difficult to establish. Accordingly, the question of whether the

> employer established and implemented a policy against sexual harassment is an important factor in deciding whether apparent authority existed.

112 F.3d at 1450, Petition, App. A at 30a-31a. *See also* 112 F.3d at 1444, Petition, App. A at 15a. In contrast, the Tenth Circuit concluded that a sexual harassment policy is not determinative under the second clause of § 219(2)(d) of whether a supervisor used delegated authority over the work environment to facilitate the harassment. 112 F.3d at 1446, Petition, App. A at 19a. *See also* 112 F.3d at 1445, Petition, App. A at 16a.

In so holding, the Tenth Circuit followed this Court's decision in *Meritor*. In that case, the Court stated:

> [W]e reject petitioner's view that the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent's failure to invoke that procedure, must insulate petitioner from liability. While those facts are plainly relevant, . . . they are not necessarily dispositive.

477 U.S. at 72, 106 S.Ct. at 2408. The Tenth Circuit followed this holding by concluding that evidence of the existence and implementation of a policy against harassment was relevant, but not dispositive of all agency issues.

Even if EPI's policy against discrimination and grievance procedure were dispositive of claims under the second clause of § 219(2)(d), as claimed by EPI, there would be factual issues respecting the dissemination of the policy. *See Gary v. Long*, 59 F.3d 1391, 1398 (D.C.Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 569, 133 L.Ed.2d 493 (1995)

(defense depends on the ability of the employer to establish that its employees could not reasonably have failed to know of the policy and grievance procedure). EPI claims that its sexual harassment policy "was posted on all bulletin boards where any employee wishing to read it had the opportunity to read such policy." Petition at 3. This contention is not supported by the record. See the Tenth Circuit's discussion of this issue found at 112 F.3d 1442, Petition, App. A at 9a.

EPI's testimony as to dissemination was that the policy was distributed to supervisors "with instructions to . . . post it on the bulletin board in the work area," 10th Cir. App. K, p. 49, and that it was "placed on bulletin boards out on the surface, in the office and underground," 10th Cir. App. J, p. 61. There was no testimony as to whether the policy was placed on *all* bulletin boards or whether copies of the policy remained on any bulletin boards, or remained uncovered, after they were posted in 1989.

Ms. Harrison specifically testified that the policy was not posted on the board near the mine shaft or the board in the women's changing room, the particular bulletin boards where she might have seen it. 10th Cir. App. H, p. 91. It is undisputed that EPI never gave Ms. Harrison a copy of the sexual harassment policy and never discussed the policy with her. 10th Cir. App. H, pp. 15-16. Ms. Harrison did not discover the sexual harassment policy until after some of the sexual assaults by Mr. Brown had already occurred, when she discovered it by chance in a shop where she did not usually work. 10th Cir. App. H, pp. 92-93. Thus, even if EPI's discrimination policy was relevant to a determination of whether Mr. Brown was

aided in accomplishing the harassment by his authority to control Ms. Harrison's work environment, there would be fact issues as to whether the policy was adequately disseminated to EPI's employees.

C. THERE IS NO CONFLICT WITH DECISIONS OF OTHER CIRCUITS REQUIRING IMMEDIATE CLARIFICATION BY THE COURT.

EPI greatly overstates the extent of the conflicts with the holding of the Tenth Circuit. Few cases have discussed liability under the second clause of Restatement (Second) of Agency § 219(2)(d). Although some of the cases cited by EPI state what appear to be narrower grounds for employer liability than that set forth by the Tenth Circuit, the cases mostly do not involve situations where the supervisor was aided by the use of his delegated authority and do not involve claims that liability should be predicated on the second clause of Restatement (Second) of Agency § 219(2)(d). If presented with appropriate facts and a claim of liability under the second clause of § 219(2)(d), other courts might agree with the standard stated by the Tenth Circuit.

Further, there is no conflict with the decisions cited by EPI on the issue of the effect of policies against harassment and remedial procedures and actions. The decisions cited by EPI find that evidence of such policies, procedures, and actions are relevant to the following particular issues: negligence in responding to known harassment, *Nash v. Electrospace System, Inc.*, 9 F.3d 401, 404 (5th Cir. 1993); the supervisor's apparent authority, *Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 110 (3rd

Cir. 1994); and the employer's diligence in seeking to be apprised of the conduct of its employees for the purpose of imputing constructive knowledge of harassment to the employer, *Farley v. American Cast Iron Pipe Company*, 115 F.3d 1548, 1554 (11th Cir. 1997). In this case, the Tenth Circuit similarly held that evidence of a sexual harassment policy is relevant to a particular issue, a supervisor's apparent authority to harass. 112 F.3d at 1450, Petition, App. A at 30a-31a. The Tenth Circuit did not hold that evidence of a harassment policy and remedial procedures are not relevant to the other issues as to which such evidence was found to be relevant in the cases cited by EPI. There is thus no conflict among these cases.

Moreover, any conflicts that may exist are not intolerable. EPI overstates the importance of this issue. As demonstrated by the fact patterns in the cases cited by EPI, supervisors do not frequently use their delegated authority to control the work environment in accomplishing sexual harassment. The rights of few litigants will be affected by a decision not to address this issue at this time.

EPI argues without explanation that it is "obvious" that employers can have substantial difficulty in implementing different work rules in different circuits because of the claimed different standards for employer liability. Petition at 18. In fact, the standard for employer liability should not effect work rules. Sexual harassment is against the law and just plain wrong. Regardless of what the details of the employer liability standard are, an employer should create and adequately publicize a policy

against sexual harassment, implement an effective reporting procedure for when it does occur, and take vigorous steps to put an end to harassment whenever it is reported.

EPI also claims, again without elaboration, that the decision of the Tenth Circuit "dampens, if not destroys" the incentive to adopt and enforce a policy against sexual harassment. Petition at 18. This claim similarly does not stand up to scrutiny. Employers will always be motivated to adopt policies against sexual harassment and educate their employees about the policies because they want to stop sexual harassment claims, which are costly to them. If there are more circumstances in which the employer may be liable for a supervisor's harassment, the motivation to stop harassment in the first instance will only increase, not decrease. *Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 110 (3rd Cir. 1994).

Moreover, employers also have ample incentive to put an end to harassment when it does occur. If an employer learns of harassment, but does nothing, damages will continue to mount. Employers will also be exposing themselves to liability under Restatement (Second) of Agency § 219(2)(b), which provides for liability when the employer is negligent in failing to respond to known harassment. They will be opening themselves up to punitive damage claims. Finally, if an employer vigorously enforces its sexual harassment policy, it will be sending a message to its work force that an employee who engages in sexual harassment will face serious consequences. There will then be likely to be fewer incidents of sexual harassment and fewer claims against the employer in the future. There is thus ample economic

incentive to motivate an employer to do everything that it can to prevent harassment and to put an end to harassment if it does occur.

The Court denied certiorari in the past term in at least one case presenting the issue of the basis for imposing liability on employers under Title VII. *OI-NEG TV Products, Inc. v. Durko, cert. denied,* 65 U.S.L.W. 3688 (No. 96-1263; unpublished court of appeals decision; summary published at 65 U.S.L.W. 3603).

IV. THE COURT SHOULD DENY CERTIORARI ON THE ISSUE OF WHETHER THE ARBITRATION PROVISIONS IN THE COLLECTIVE BARGAINING AGREEMENT REQUIRED MS. HARRISON TO ARBITRATE HER TITLE VII CLAIMS

Certiorari should be denied on the issue of whether the arbitration provisions in the Collective Bargaining Agreement ("CBA") between EPI and Ms. Harrison's union compelled Ms. Harrison to arbitrate her Title VII claims because (1) the Tenth Circuit's opinion is consistent with the great weight of the case law, including *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974) and *Livadas v. Bradshaw*, 512 U.S. 107, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994); (2) the District Court correctly found that EPI's delay in asserting the arbitration issue resulted in EPI's waiving that claim; and (3) claims based upon Ms. Harrison's rights under Title VII are not within the scope of the arbitration provisions of the CBA.

A. THE TENTH CIRCUIT'S DECISION IS CONSISTENT WITH THE GREAT WEIGHT OF AUTHORITY, INCLUDING THIS COURT'S PRIOR DECISIONS

EPI acknowledges that its position on the arbitration issue is contrary to this Court's decision in *Alexander v. Gardner-Denver Co., supra.* In essence, EPI is asking this Court to overrule *Gardner-Denver.* EPI places its primary reliance on *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991). *Gilmer*, however, specifically discusses *Gardner-Denver*, and at 500 U.S. at 33-35, 111 S.Ct. 1656-7 confirms the reasoning and holding of *Gardner-Denver* in the specific context involved here; i.e., whether an arbitration provision in a collective bargaining agreement deprives an individual employee of his or her right to litigate a Title VII claim in court. Moreover, in *Livadas v. Bradshaw, supra*, 512 U.S. at 127, 114 S.Ct. at 2080, n. 21, this Court referred to the interplay between *Gardner-Denver* and *Gilmer*, as follows:

> In holding that an agreement to arbitrate an Age Discrimination in Employment Act is enforceable under the Federal Arbitration Act, *Gilmer* emphasized its basic consistency with our unanimous decision in *Alexander v. Gardner-Denver Co.*

It is thus difficult to argue that *Gardner-Denver* is no longer good law, since this Court has repeatedly said that it is.

Other federal courts have also recognized that *Gardner-Denver*, and not *Gilmer*, continues to govern the issue of whether an employee can be forced to arbitrate federal statutory claims in the collective bargaining

agreement context. *Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 946 (1997); *Tran v. Tran*, 54 F.3d 115, 117-8 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 1417 (1996); *Griffith v. Keystone Steel and Wire Company, Inc.*, 858 F. Supp. 802, 804 (C.D. Ill. 1994); *Bush v. Carrier Air Conditioning*, 940 F. Supp 1040 (E.D. Tex. 1996), and cases cited; *Schmidt v. Safeway, Inc.*, 864 F. Supp. 991 (D. Ore. 1994); *DiPiccio v. United Parcel Service*, 890 F. Supp. 688, 691-2 (N.D. Oh. 1995).

As the Tenth Circuit noted at 112 F.3d 1453, Petition, App. A at 38a, *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996), is, to a degree, inconsistent with the Tenth Circuit's opinion. *Austin* can be factually distinguished, however, in that the collective bargaining agreement involved there specifically provided for the use of grievance procedures to resolve the plaintiff's claims under the Americans With Disabilities Act. 78 F.3d at 879-80. The CBA in the present case, however, does not provide for its grievance procedures to be used to resolve Title VII claims. See Section IV C., infra.

B. EPI HAS WAIVED THE ARBITRATION ISSUE

The District Court's January 8, 1996 Order, Petition, App. C at 48a-50a found that:

> For the reasons stated orally on the record and in view of the actions already taken by the parties prior to the time Defendant Eddy Potash first raised the issue of mandatory arbitration, I ruled that Defendants had waived their right to compel arbitration. In making my ruling, I considered the factors set forth by the Tenth Circuit

> *Fenner & Smith*, 39 F.2d 1482, 1489 [10th Cir. 1994] and in *Peterson v. Shearson/American Express*, 849 F.2d 464, 465 [10th Cir. 1988].

Petition, App. C at 49a.

The District Court's finding of waiver is well supported by the record. Ms. Harrison's Complaint was filed on June 21, 1994. 10th Cir. App. A. EPI's Answer and Counterclaim made no reference to any alleged agreement to arbitrate and EPI affirmatively invoked the jurisdiction of the District Court by filing a Counterclaim against Ms. Harrison. 10th Cir. App. B. In the Pretrial Order, EPI made no reference to any alleged agreement to arbitrate, never challenged the jurisdiction of the District Court, and expressly stipulated that the District Court had jurisdiction of the parties and the subject matter. 10th Cir. App. C.

The first time EPI raised the issue of arbitration was its Motion to Dismiss, and Motion for Summary Judgment, filed on July 3, 1995, after this case had been pending in the District Court for more than a year. 10th Cir. App. D. As of that time, the parties had conducted extensive discovery and had incurred substantial attorney's fees, as well as other litigation expenses. Prior to the filing of the Motion to Dismiss and Motion for Summary Judgment on the issue of arbitration, EPI had filed several earlier Motions to Dismiss and/or Motions for Summary Judgment to which Ms. Harrison had to respond. As of the time EPI filed its Motion to Dismiss, the case had already been set for a trial on the merits. 10th Cir. App. T at 532, Docket Entry 39.

A party seeking to compel arbitration waives its right to arbitrate by participating in the litigation for a substantial period of time, and when important intervening steps, including such things as deposing witnesses, filing motions, filing counterclaims, etc., have taken place. *Metz v. Merrill Lynch Pierce Fenner & Smith*, 39 F.3d 1482 (10th Cir. 1994). When this case was before the Tenth Circuit, EPI never attempted to challenge the District Court's waiver ruling on a factual basis. Instead, EPI argued that there can never be a waiver of an arbitration clause in a collective bargaining argument. Thus, under EPI's theory, an employer could wait until the employee's Title VII claim had been tried on the merits in federal district court, or could even wait until after an appeal had been concluded in a federal court of appeals, before raising the "arbitration" issue.

Fortunately, the law does not support EPI's position. *Baca v. Sipes*, 386 U.S. 171, 185, 87 S.Ct. 903, 914, 17 L.Ed.2d 842 (1967), states:

> An obvious situation in which the employee should not be limited to the exclusive remedial procedures established by the [collective bargaining] contract occurs when the conduct of the employer amounts to a repudiation of those contractual procedures. [citing authorities] In such a situation [and there may, of course, be others], the employer is estopped by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's cause of action.

A party to a collective bargaining agreement can waive the arbitration provisions of that agreement by its delay in asserting the arbitration provision after litigation

had been commenced. *Reid Burton Construction v. Carpenter's District Council of Southern Colorado*, 614 F.2d 698, 702 (10th Cir. 1980); *Jones Motor Company v. Chauffeurs, Teamsters and Helpers Local Union No. 633*, 671 F.2d 38 (1st Cir. 1982); *E.T. Simonds Construction Company v. Local 1330, International Hod Carriers*, 315 F.2d 291 (7th Cir. 1963) and cases cited. *See Varner v. National Super Markets, Inc., supra* at 94 F.3d 1213 (the only prerequisites to a federal court having jurisdiction over a Title VII claim are those found in Title VII itself).

C. MS. HARRISON'S TITLE VII CLAIMS AGAINST EPI ARE NOT WITHIN THE SCOPE OF THE ARBITRATION PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT.

Section 14.1 of the CBA states:

> If a **grievance** is not settled by the procedure set forth in the Grievance Procedure, the Union may upon written notice to the Company, refer the grievance to arbitration. This shall be done no later than ten [10] working days following receipt of the Step Three Answer. No employee may compel the arbitration of a grievance without the written consent of the Union. (emphasis added)

Petition, App. E at 67a.

The arbitration provision, by its terms, only applies to a "grievance." Section 13.1 of the CBA defines "grievance" as meaning "any dispute between the Company and an employee or between the Company and the Union **over the interpretation or application of terms of this**

Agreement." (emphasis added) Petition, App. E at 65a. Ms. Harrison's Title VII claims did not involve the "interpretation or application of terms of [the CBA]." Instead, Ms. Harrison's claims against EPI involved the interpretation and application of Title VII, the New Mexico Human Rights Act, and various common law causes of action. Ms. Harrison's right not to be sexually assaulted existed independently of the CBA.

Alexander v. Gardner-Denver Company, supra, states:

> In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both are violated as a result of the same factual occurrence.

415 U.S. at 49-50, 94 S.Ct. at 1020.

Similarly, in *Gilmer v. Interstate/Johnson Lane Corp., supra,* this Court stated:

> In holding that the employee was not foreclosed from bringing the Title VII claim, we stressed that an employee's contractual rights under a collective-bargaining agreement are distinct from the employee's statutory Title VII rights.

500 U.S. at 34, 111 S.Ct. at 1656-7.

See also Griffith v. Keystone Steel & Wire Company, supra, which held that an arbitration provision in a collective bargaining agreement did not prevent the employee from pursuing his Title VII claim in court, stating:

> He is not suing to enforce contractual rights, which would be covered by the CBA, but rather his statutory rights under Title VII.

858 F. Supp. at 804.[1]

Had it been the intent of the CBA that any and all disputes between EPI and one of its union employees was subject to arbitration, the CBA would have defined "grievance" to include any and all such disputes. Instead, the CBA limits the definition of "grievance" so as to relate only to disputes "over the interpretation or application of terms of [the] Agreement." Ms. Harrison is not suing to enforce contractual rights created by the CBA, but rather is suing to enforce her statutory rights under Title VII.

A highly analogous case is *Hawaiian Air Lines, Inc. v. Norris*, 512 U.S. 246, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994). Mr. Norris' employment with Hawaiian Air Lines was subject to the Railway Labor Act ("RLA"), 45 U.S.C. § 151 et seq. The RLA had set up a mandatory arbitration mechanism to handle disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." 43 U.S.C. § 153, 512 U.S. at 248. The question presented in the *Norris* opinion " . . . is whether an aircraft mechanic who claims that he was discharged for refusing to certify the safety of a plane that he considered

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[1] The Collective Bargaining Agreement in the present case contains a general "non-discrimination" provision. Petitioner's App. at p. 68a. The collective bargaining agreement involved in *Griffith* had a materially identical "non-discrimination" provision. 858 F. Supp. at 803.

unsafe and for reporting his safety concerns to the Federal Aviation Administration may pursue available state-law remedies for wrongful discharge, or whether he may seek redress only through the RLA's arbitral mechanism." 512 U.S. at 248, 114 S.Ct. at 2241. A unanimous Court held that the RLA did not preempt Mr. Norris' state-law causes of action. 512 U.S. at 248, 114 S.Ct. at 2241. This decision was based upon the applicable statutory language which, as noted above, provided for arbitration only with regard to disputes "growing out of grievances or out of the interpretation or application of [the CBA]. . . . " This Court first noted its belief " . . . that the most natural reading of the term 'grievances' in this context is as a synonym for disputes involving the application or interpretation of a CBA." 512 U.S. at 255, 114 S.Ct. at 2245. *Norris* also refers to several United States Supreme Court opinions which held that the RLA's arbitration provisions do " . . . not pre-empt causes of action to enforce rights that are independent of the CBA." 512 U.S. at 256, 114 S.Ct. at 2246, and that "substantive protections provided by state law, independent of whatever labor agreement might govern, are not pre-empted under the RLA." 512 U.S. at 257, 114 S.Ct. at 2246. It is only when the CBA is the "only source" of the employee's rights against the employer, that arbitration is required. 512 U.S. at 257-8, 114 S.Ct. at 2246. If, on the other hand, the CBA is not the "only source" of the employee's rights against the employer; i.e., if the employee's claims are based upon provisions of state or federal[2] law which are

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[2] *See Atchison Topeka and Santa Fe Railway Company v. Buell*, 48 U.S. 557, 107 S. Ct. 1410, 94 L.Ed.2d 563 (1987).

not dependent upon any provision of the CBA, then the dispute is not within the scope of the arbitration mechanism referred to above. 512 U.S. at 258, 114 S.Ct. at 2247

Similar considerations are applicable here. Just as the applicable statute in *Norris* provided only for arbitration with respect to disputes involving the "interpretation or application" of the CBA; so it is that the arbitration provisions of the CBA here, provides for arbitration only for disputes involving the "interpretation or application" of the CBA. As *Norris* makes clear, such language does not require arbitration of claims based upon provisions of state and/or federal law which are not dependent upon the CBA.

As noted above, the scope of the arbitration provision contained in the present case factually distinguishes this case from *Austin v. Owens-Brockway Glass Container, Inc., supra,* in which the "arbitration" provision in the CBA specifically referred to arbitration of an employee's claims under the Americans With Disabilities Act. At 78 F.3d 885, *Austin* emphasizes this factual distinction in stating that "Miss Austin is a party to a voluntary agreement to submit statutory claims to arbitration. The collective bargaining agreement specifically lists gender and disability discrimination as claims that are subject to arbitration." The Fourth Circuit itself has recognized this distinction, and has held that when an arbitration clause in a collective bargaining agreement merely requires arbitration of grievances that involve "interpretation or application" of the CBA, such language does not require arbitration of the employee's statutory claims. *Martin Marietta v. Maryland Commission on Human Relations,* 38 F.3d 1392, 1402 (4th Cir 1994), states:

What distinguishes *Gilmer* from the instant case is that the broad mandatory language of the arbitration clause at issue in *Gilmer*, which encompassed a New York Stock Exchange rule, provided that Gilmer must arbitrate "any dispute, claim or controversy" arising with his employer. *Id.* at 23, 111 S.Ct. at 1650. The CBA arbitration clause applicable to Price is more narrow, as it is written in permissive terms and encompasses only grievances that involve "interpretation or application" of CBA provisions.

V. CONCLUSION

Sup.Ct.R. 10.1 provides that a petition for a writ of certiorari will be granted only when there are special and important reasons therefor. EPI's Petition fails to meet that standard. EPI's Petition for Writ of Certiorari should be denied, as to all issues.

Respectfully submitted,

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